

Federation of Law Societies
of Canada



Fédération des ordres professionnels
de juristes du Canada

**Submission of the
Federation of Law Societies of Canada
to the
Senate Committee on Banking, Trade and
Commerce**

***Statutory Review of A second Act to
implement certain provisions of the
budget tabled in Parliament on
February 27, 2018 and other measures***

Ottawa, November 22, 2018

INTRODUCTION

1. The Federation of Law Societies of Canada (“Federation”) is the national coordinating body of Canada’s 14 provincial and territorial law societies, which together govern Canada’s 125,000 lawyers, Quebec’s 4,500 notaries, and Ontario’s nearly 9,000 paralegals in the public interest. The Federation promotes the development of national standards, encourages the harmonization of law society rules and procedures, and undertakes national initiatives as directed by its members, among other activities. The Federation also speaks out on issues critical to safeguarding the public’s right to an independent legal profession, the protection of solicitor-client privilege and other issues relating to the administration of justice and the rule of law.

2. The Federation appreciates the opportunity to contribute to the Committee’s review of Bill C-86 (“*A second Act to implement certain provisions of the budget tabled in Parliament on February 27, 2018 and other measures*”), and specifically, its review of the proposed *College of Patent Agents and Trade-mark Agents*.

SUBMISSION HIGHLIGHTS

3. Bill C-86 proposes to establish the *College of Patent Agents and Trade-mark Agents Act* (“the College”), setting out a comprehensive regime for the licensing and supervision of patent and trademark agents, including governance criteria and investigatory and disciplinary committees, with an expressed purpose of regulating patent agents and trade-marks agents in the public interest.

4. Of concern to the Federation is the fact that all patent and trademark agents – including those already licensed as lawyers or Quebec notaries – will be required to be members of the new regulatory body. In the submission of the Federation, such a proposed College would result in unnecessary regulatory duplication. Many IP agents are lawyers and Quebec notaries who are already regulated by provincial or territorial law societies. There is no public interest reason to subject lawyer and notary IP agents to regulation by two distinct regulatory bodies and the additional regulatory burden, potential conflicts and likely confusion created by such duplication should be avoided.

DUPLICATION OF REGULATION

5. All lawyers and Quebec notaries in Canada are subject to a robust regulatory regime established by provincial and territorial statutes. They must be licensed by the law society in their respective jurisdiction and are subject to comprehensive rules and regulations intended to protect the public. Despite this fact, the proposed College will include regulatory oversight of lawyer/notary *and* non-lawyer IP agents, a model that would lead to regulatory duplication with two regimes regulating the same individual. Such regulatory duplication is neither necessary nor desirable.

6. The primary purpose of all professional regulation is to protect the public interest, which is also the legislative purpose of the proposed College. Lawyer and Quebec notary IP agents should be included in the new regulatory regime for IP agents only if necessary to protect the public interest. It is not. Lawyers and Quebec notaries who are also IP agents are subject to the regulatory authority of the law societies, each of which is mandated by statute to regulate the legal profession in the public interest. The interests of the public are protected through comprehensive rules of professional

conduct and law society regulations that include complaints and disciplinary processes to address breaches of the rules and regulations.

7. The Federation recognizes that there are instances in which an individual may be a member of two professions – law and accounting or law and medicine being two possible examples. In those cases the individual may be governed by two different regulatory bodies. Unlike the situation with lawyers/notaries and IP agents, however, the scope of practice of each of those professions is distinct. Discerning when the individual is acting as one or the other, a lawyer or a doctor, for example, is straightforward and identifying which regulator has jurisdiction in a particular case is equally straightforward. As important, a member of the public using the services of the individual is not likely to be confused about the professional capacity within which they are acting.

8. The potential for public confusion in the case of a lawyer or notary IP agent is, by contrast, significant. Members of the public using the services of a lawyer or Quebec notary for an IP matter are unlikely to be able to distinguish between legal work and IP work. As the IP agent regulator would have no jurisdiction over a lawyer/notary IP agent when the individual is practicing law, governing lawyer IP agents through two separate regulators would lead to unnecessary, undesirable public confusion. It would also create the potential for conflicting rules and obligations that could put individuals in the impossible situation of having to choose between regulatory obligations, possibly violating the rules of one regulator to satisfy those of the other.

9. In past consultations on this issue, representatives of Innovation, Science and Economic Development Canada have suggested the regulators should be able to coordinate efforts to determine who has jurisdiction in a given situation. Such coordination might address some of the potential jurisdictional concerns, but protocols and agreements between the regulators are unlikely to do away with public confusion. In addition, it is not clear that full cooperation between distinct regulators would be possible. Statutory provisions preventing law societies from sharing information covered by solicitor-client privilege could, for example, hamper cooperation in discipline cases. The preferable approach would be to avoid the potential conflicts and confusion. As discussed above, the public interest in the practice of lawyer/notary IP agents is already fully protected through regulation by the law societies.

10. A regulatory framework that requires lawyer/notary IP agents to be governed by two separate regulators would also violate the principle that regulation should not be more burdensome than necessary to accomplish its goals. The proposed regulatory duplication would increase costs for individual lawyer/notary IP agents (and probably also for the regulatory bodies) and would require those agents to invest time and human resources in ensuring that they are aware of and in compliance with two sets of rules and regulations. In addition to being unnecessarily burdensome, the approach would be inefficient.

11. Finally, the prospect of dual regulation raises potential confusion over solicitor-client privilege, which is a fundamental constitutional principle distinct to any statutory privilege granted to patent agents and trade-mark agents. While the proposed legislation seeks to protect solicitor-client privileged information in the course of an investigation, it also allows an investigator to access solicitor-client privileged information if the information at issue is also related to agent privileged information. This example demonstrates how dual regulation generally creates the prospect of conflating agent and

solicitor-client privilege, thus compromising what the Supreme Court has repeatedly characterised as a principle of fundamental justice that must be afforded the highest possible protection.

LEGISLATIVE EXEMPTION TO PROPOSED COLLEGE'S OVERSIGHT

12. One way of avoiding this unnecessary regulatory duplication would be to exempt lawyer and Quebec notary IP agents who are already regulated by a Canadian law society from regulation by the proposed College.

13. There is a recent precedent for this approach. When the government introduced the regulatory regime for immigration consultants it specifically exempted practitioners already regulated by law societies. Although the scope of practice of lawyers providing immigration advice and representation is broader than that of immigration consultants, there is some direct overlap. Notwithstanding this overlap, lawyers providing immigration services are not required to become members of the designated regulatory body for immigration consultants. Pursuant to section 91(2) of the *Immigration and Refugee Protection Act*, only members of a Canadian law society (including the *Chambre des notaires du Québec*) or the regulatory body designated under the Act may represent a person in a proceeding or application under the Act.

14. The exemption of lawyers and Quebec notaries from the regulatory regime for immigration consultants recognized that there would be no public policy purpose in subjecting members of law societies to double regulation. The goal of public protection is met through law society regulation, as it would be were the government to take a similar approach to the regulation of IP agents.

15. The Federation recognizes that to register as an IP agent an individual must meet certain criteria, including successful completion of prescribed exams. We are not proposing that lawyer IP agents be exempt from this requirement in the event it is administered by the proposed College as the regulator for IP agents. It is important to note that registration is only one aspect of regulation. In our submission a comprehensive and coherent system of regulation that appropriately addresses all public risks can be established by recognizing law society regulation of lawyer IP agents, subject only to the requirement that lawyer/notary IP agents meet the prescribed registration criteria.

CONCLUSION:

16. The Federation maintains that the proposed legislation is problematic as it establishes undue regulatory burden on lawyers and Quebec notaries who are also IP agents by requiring them to be supervised by two regulatory bodies; it also creates significant likelihood of public confusion between the two separate regulators governing lawyer/notary IP agents. The Federation thus advocates that this Committee recommend an amendment to C-86 that exempts lawyers and Quebec notaries who are also patent agents and trade-mark agents from the proposed College's oversight. We would welcome the opportunity to discuss these matters further and to otherwise assist the Committee in its review of the Act.